remanded the record on appeal to the district court to permit petitioner to make any appropriate motion directed toward the original order and judgment of the district court (R. 360).

On March 26, 1957, petitioner moved the district court for an order increasing the compensation in that the Government had failed to give notice of its intention to take and use the premises for an additional yearly term commencing July 1, 1958 (R. 361). After a hearing before Judge Knox the motion was in all respects denied (R. 388), and an appeal from the order was filed on May 15, 1958 (R. 4-5).

B. The Evidence*

Petitioner called four witnesses, Messrs. Keller, Crawford and Eckstein, the real estate experts, and Harvey Gibson, chief of the real estate division of the General Service Administration for the New York area. The Government called one real estate appraiser, Edward K. Hines.

The witness Crawford** noted that thirty days prior to the termination of any annual term the Government could give notice that it intended to renew, or conversely its intention to vacate (R. 246, 252). He stated that an additional increment for the option over and above the normal market rental value should be granted petitioner. The uncertain period of the Government's occupancy had

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* Since we seek review only of the failure to compensate petitioner for the reservation of the right to renew, we present the evidence bearing on that issue only.

** This witness, a veteran real estate expert and a senior vice president of Charles F. Noyes & Co. (R. 240-244), was recognized as authoritative by the district court (R. 335):

> "So far as the current rental value of East 16th St. property is concerned, the testimony of Edward J. Crawford, Sr., is more important than that of any other witness."

a severe adverse effect upon the landlord. It virtually destroyed the ability of petitioner to sell the property at a figure anywhere close to its true value (R. 253). Particularly during this period of high rentals, it deprived petitioner of the opportunity to lease the premises under a long term lease (R. 253, 276). Mr. Crawford stated that if the Government vacated the premises it would take a year or more to prepare the property and rent it on the open market (R. 253). The normal rental period for this type of space is generally around February 1st (R. 253).

The witness Keller likewise stressed the fact petitioner was entitled to an increase of 15% above the normal leasehold rental to compensate for the Government's option and because of the injurious consequences of the Government's option. Such an option decreased or destroyed the salability of the premises, reduced its value and placed the landlord in a dangerous position of having a 100% vacancy on short notice which would take at least six months to one year to fill substantially (R. 69). In all Mr. Keller's experience he had never heard of a landlord willing to give such option terms (R. 68).

Petitioner's third expert witness, Mr. Eckstein, similarly was of the view that the Government's option should be specially compensated for (R. 289-290). And the rental appraisal of the Government's expert was based on occupancy for a finite two year term without regard to the Government's option to renew (R. 124).

Mr. Harvey Gibson, chief of the real estate administration of the General Services Administration, responsible for the acquisition of general purpose space for Federal agencies in this area (R. 31-49) testified that the Corps of Engineers and other agencies which occupied petitioner's premises are not considered permanent occupants (R. 35). On April 5, 1957 he could not give a definite answer whether the Government would continue to occupy the premises after June 30, 1957. As stated by Mr. Gibson (R. 35):

> "I couldn't tell you whether they will be here one year from today, or one month from today.
>
> • • •
>
> "Q. And that would also apply, therefore, that you do not know how long they would be in this particular building? A. That is correct."

Continuing occupancy depends upon year to year appropriations by Congress and plans of the particular agency. To meet these problems the Government protects itself by condemning for a limited period with the option to renew from year to year (R. 23, 35, 36).

C. The Trial Court's Opinion

On July 8, 1957, Judge Knox rendered his opinion (R. 329-340). The Court unequivocally refused to compensate petitioner for the Government's option to renew and extend. It disregarded the past terms which were at issue in the trial, and dealt solely with the uncertainty imposed by the short notice within which the Government might elect to continue for additional annual terms. It apparently (but see *infra*) made a limited concession to the uncertainties of Government's future taking by a provision concerning the time of notice, stating (R. 340):

> "• • • unless the Government, on or before Jan. 1, 1958, notifies the landlord as to whether it will continue its tenancy beyond June 30, 1958, the landlord may apply for the fixation of a yearly rental in excess of $.90 per sq. ft., and which, • • • will serve as some compensation to the landlord for the uncertainty with which it is now faced."

D. Post Trial Proceedings

On December 23, 1957 the Government filed notice that it would "continue its tenancy of the premises involved in this proceeding beyond June 30, 1958" (R. 348).

In the post trial proceedings already referred to the trial court denied petitioner's motion for additional compensation on the ground that the purpose of the notice provision merely was to assure petitioner that the current term, ending June 30, 1958, to which the Government was already obligated, would not be cancelled without a penalty (R. 373).

Reasons for Granting the Writ

1. We assume here that the amount fixed by the trial court would be a fair annual market rental value of petitioner's premises for a finite term of two years, no option to renew. But the District Court in its opinion order and judgment establishing the fair market rental value did not compensate petitioner for the value of the option, nor did it consider these terms of the taking in establishing the rate of compensation. Rather, it ordered that in the event the Government did not give six months notice of its election to continue occupancy, petitioner could apply for additional compensation.*

The Court held in *United States* v. *General Motors Corp.*, 323 U. S. 373, that in a condemnation proceeding long term rental values cannot be the criterion for short term occupancy and that certain consequential damages should be considered in setting the compensation to be paid. The Court stated that to do otherwise in cases of partial takings of leasehold or fee interest would sanction a device which could circumvent the mandate of the Fifth Amendment and convert "'just compensation' into some such concept as the common law idea of a peppercorn in the law of seizin • • •" (at pp. 381, 382). For, "it is [illegible]ther another

* This notice on its face related to a period beyond the instant condemnation proceedings, and would seem to require a commitment of occupancy for an additional annual term (R. 340), but was subsequently construed as not applying to the future and not requiring a commitment for an additional year (R. 373, 386).

matter when the Government does not take his entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however, few or minute and leaves him holding the remainder * * *" (at p. 382). The Court concluded that consequential damages could not be established as independent items of damages, but were to be used "to aid in the determination of what would be the usual—the market—price which would be asked * * *" (at p. 383).

2. The Government, in the course of the General Motors litigation, attempted to circumvent the problem by amending the complaint to provide for an indefinite term, "a term of years * * * expiring June 30, 1943, renewable for additional yearly periods thereafter * * *" (at p. 376, n. 3). But the Court insisted that the Government's substituted form of taking embraced an option, a thing of value, for which the condemnee must be compensated (at p. 376, n. 3):

> "If, on remand, the case be treated as involving the Government's option of renewal, the additional value of that interest must be included in the compensation awarded."

See also, *United States* v. *Petty Motors Co.*, 327 U. S. 272, and *Kimball Laundry Co.* v. *United States*, 338 U. S. 1.

3. It hardly need be argued that an option to renew or extend has substantial value for which a condemnee must be paid. See, *Brooklyn Eastern District Terminal* v. *New York*, 139 F. 2d 1007 (C. A. 2); *United States* v. *Certain Parcels of Land*, 55 F. Supp. 257; *United States* v. *Bauman*, 56 F. Supp. 109 (D. C. Ore.); *United States* v. *Crown Zellerbach Corp.*, 60 F. Supp. 853 (D. C. Ore.); *United States* v. *70.39 Acres of Land*, 164 F. Supp. 451 (D. C. Cal.).

4. Moreover, the damage imposed by the option upon the residual estate is palpable. The sales value of premises such as this is determined basically by the rental received

and the stability of that income. Therefore, tenants occupying a substantial part or the total area of an office building normally are obligated to sign leases for substantial periods of time—a minimum term of five and as much as twenty years. Thus the owner achieves some security and establishes the value of his premises. But here the Government's option destroys the salability of the property and diminishes its value (R. 69, 246, 253). Financing petitioner's property becomes most difficult. Any established lending institution would be wary about giving a substantial mortgage on property which faces a total vacancy at any time. Likewise, petitioner is deprived of the advantage of a long term lease at current high rental values (R. 276).

If the current rental market suffers a decline and the Government vacates the premises, the landlord is forced to rent at a time when the return will be low (R. 339). Moreover, the Government could terminate the condemnation proceeding and institute another one under more favorable conditions. On the other hand, if the market is high, the Government has the option at the end of any yearly term to rid itself of any obligation to continue its occupancy. Petitioner is given no opportunity to plan for these exigencies.* The trial court's disregard of the damage imposed upon the estate not taken by the Government cannot be squared with the ruling of the Court in *Bauman* v. *Ross*, 167 U. S. 548.

5. Nor did the trial court comply with the applicable standards for just compensation by its direction to the Government for the giving of six months notice of an intention to continue for a term beyond the period covered by the condemnation proceeding, June 30, 1958, which was the date of termination of the fifth and last year of the taking, *supra*.

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* It is hardly surprising that not one of the real estate experts in this proceeding would recommend or was aware of any similar option terms in the open market place (R. 155-156).

The Court of Appeals in a fashion that bewilders us held that this notice provision as to future occupancy substituted for compensation for the option the Government enjoyed for the preceding two years (App. V, VI). But this notice provision, whatever its scope or meaning, could hardly cancel the value of the option.

Moreover, even if it were conceivable that the notice provision could relate to the option, at most it would affect future proceedings and not the period before the Court.

Besides, the law is clear that the value of the option is to be determined as of the time of the taking and included in the award at time of the inquest. It cannot be made contingent upon the Government's subsequent acts.* See *United States* v. *Crown Zellerbach Corp.; United States* v. *Bauman; United States* v. *Certain Parcels of Land*, all *supra; United States* v. *60,000 Square Feet of Certain Parcels of Land*, 53 F. Supp. 767 (D. C. Cal.).

6. The post-trial proceedings for additional compensation expose the meaningless character of the notice provision. On December 23, 1957, the Government in purported compliance with the court's order, gave notice to petitioner of its intention to continue its tenancy beyond June 30, 1958. The record establishes that the Government's notice was not intended to commit it to an additional yearly term, let alone a renewal of another 5 year taking (R. 364, 384). Under these circumstances the Government's commitment could have been redeemed literally if it had merely spent the month of July vacating the premises as it had a right to do in any event (R. 364).

We believe that the purpose of the notice requirement, whatever its relevance to the issue of compensation for the

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* This compensation award covered a period of two years from July 1, 1956, through June 30, 1958, and for those years the notice of election was given approximately thirty days prior to the end of the term (May 31, 1956 and May 23, 1957). For these years there was no six months notice (R. 2, 17).

option, was to obligate the Government to a yearly term beyond June 1958 (R. 369, 376-378). At the supplementary post-trial proceedings, however, the district court indicated that the purpose of the notice was merely to eliminate uncertainty not as to a new term but as to continued occupancy prior to the end of June 30, 1958—a term for which it was already obligated (R. 236). The court ruled that only in the event the Government left the premises prior to the expiration of the term would petitioner be entitled to additional compensation (R. 386). Thus, this notice provision, which the Court of Appeals thought constituted a form of compensation for the option was construed by the district court to give petitioner nothing more than it already had.

We perhaps have dwelt overlong on this bizarre notice provision. We merely seek to emphasize that both lower courts fell into confusion and self and mutual contradiction in improvising a device to substitute for a long established, well understood property interest.

7. Not only did the trial court fail to award compensation for the Government's option to renew, but it expressly disavowed the propriety of such compensation (R. 340, 343-347, 371-387). For this reason it is hard to understand the ruling of the Court of Appeals that the trial court took the option into account in awarding compensation.

This inconsistency is not resolved by the Court of Appeals' itemization of the factors assertedly taken into consideration by Judge Knox in arriving at an award (App. V, VI).*

*1. At the end of Government occupancy the building must be reconverted; 2. Landlord need not maintain or operate the interior of the buildings; 3. Compensation based on total floor area including lobbies, corridors, and toilets; 4. Single tenants requiring 250,000 square feet of space are unusual; 5. Rentals in the area will in the future decline; 6. Landlord may negotiate or litigate the annual rental (R. 339-340; App. V).

These considerations manifestly deal with the rental value of a finite term and were not intended to serve as a measure of the value of the option. Each of these factors would enter into an evaluation and award had the Government condemned for an unconditional five-year term.

8. It is clear from the trial court's opinion that the compensation awarded would have been precisely the same if there were no government option to extend and the term was for a finite non-renewable period.

But we must resolve the question of just compensation in the context of the actual taking. The Government chose to take not for a finite term but rather for five unilaterally renewable periods. Surely the power to condemn cannot be so manipulated to conjure out of existence an important and well recognized interest which this Court has held to be compensable. *U. S. v. General Motors, supra.*

Having perceived advantage in this form of taking, the Government cannot avoid the compensation to be paid for the resulting injury imposed upon the landlord's estate.

The Government has persistently sought to trivialize the important issue of valuation standards involved here by characterizing it as a conflict about the facts. But the issue cannot be so treated for the trial court itself excluded compensation for the option as a matter of law. Our dispute is not over the amount of compensation for the option, but the refusal to take it into account at all.

Nor is this issue a unique or isolated one. The form of taking involved here is characteristic and recurrent, dictated by the peculiar uncertainties of Governmental tenancy. The issue involved here will plague this Government activity for a long time to come and is bound to breed a host of uncertainties and confusion. It should be settled now. This well-documented record poses the issue clearly.

CONCLUSION

For all the above reasons the petition for writ of certiorari should be granted and the judgment of the court below reversed.

Respectfully submitted,

FRANK J. DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
Attorneys for Petitioner.

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 148—October Term, 1958

(Argued January 9, 1959 Decided March 18, 1959)

Docket No. 25275

UNITED STATES OF AMERICA,

Petitioner-Appellee,

v.

396 CORP.,

Defendant-Appellant.

Before:

CLARK, *Chief Judge,*

MOORE, *Circuit Judge* and GIBSON, *District Judge.*

Appeal from a judgment of United States District Court for the Southern District of New York, in a land condemnation case, Honorable John C. Knox, *District Judge.*

MARSHALL PERLIN, of Donner, Kinoy & Perlin, New York, New York, *for plaintiff-appellee.*

HARRY T. DOLAN, Special Assistant to the Attorney General, Brooklyn, New York (Perry W. Morton, Assistant Attorney General, Roger P. Marquis, Harold S. Harrison, Attorneys, Department of Justice, Washington, D. C., on the brief), *for defendant-appellant.*

GIBSON, *District Judge:*

This is a condemnation action in which the District Court for the Southern District of New York was called upon to fix the rent that the United States should pay for its occupancy of premises, known as 111 East 16th Street, Borough of Manhattan, New York City, for two yearly periods. The first period began July 1, 1956 and ended June 30, 1957. The second period, which the parties stipulated should be considered at the same time, that the first period was considered, commenced July 1, 1957 and ended June 30, 1958. The Government now uses this space as office quarters for the Army Engineers within this area and as offices of the Air Force Procurement Service and two or three minor branches of the Army.

This suit, which was instituted on June 16, 1953, is a continuation of a similar proceeding by the Government covering the five year preceding period. Aside from the matter of date, the terms of the taking are identical.

> "The interest to be acquired in the property is the use and occupancy of the property hereinafter described for a term of years commencing July 1, 1953 and ending June 30, 1954, extendable for yearly periods thereafter until June 30, 1958, at the election of the United States, notice of which election shall be filed in the proceeding at any time prior to the end of the term taken or subsequent extensions thereof, together with the right of removal within a reasonable time after the expiration of the term of any and all improvements or structures placed therein by or for the United States during the term of its occupancy, and any and all improvements, additions or structures which were owned and/or installed by the Government pursuant to the terms and conditions of Government Lease Contract No. W-30-082-eng-5980 with Consolidated Edison Company of New York, Inc., a New York corporation, subject, however, to existing easements for public utilities and for pipe lines."

The building in question was erected in 1909 and is of loft-type. Part of the history of the building as found by the District Court, is as follows:

> For five or six years of the depression period following 1929, the building was unoccupied. At some time, not clearly revealed, Metropolitan Life Insurance Company, through foreclosure, acquired title to the real estate. In 1937, that organization leased the same to Consolidated Edison Company for a period of five years. In 1940, the lease was extended for an additional five year term, expiring on September 30, 1947.
>
> The annual rental was $60,000. In addition, the tenant was required to pay all operating and maintenance expenses, both interior and exterior, together with insurance, taxes and assessments. This tenant, during its occupancy, is said to have installed improvements, costing about $360,000. Under the terms of the lease, these improvements were to remain upon the property.
>
> On June 1, 1945, the United States sub-leased the property from Consolidated Edison Company. It agreed to discharge all obligations assumed by its lessor, and to pay an annual rental of $126,000; and, also, to reimburse its lessor to the extent of $58,000. for removable office partitions.
>
> In, or about that year, respondent (appellant) purchased the premises from Metropolitan Life Insurance Company. The consideration was $1,000,000; the cash payment $200,000. The balance was secured by a purchase money mortgage of $800,000. with a term of fifteen years. The mortgage has since been reduced to $700,000. and this sum now carries an interest rate of 5%.

By stipulation of the parties, the yearly rental value of the property for the period September 30, 1947, through

June 30, 1953, was set by the Court at $145,335. Thereafter, again pursuant to a written stipulation of the parties, the Court fixed the annual rental for the period July 1, 1953 through June 30, 1955, at $215,000. per annum (86 cents per square foot). On May 15, 1956, the Court, once more acting upon a written stipulation of the parties, set the annual rental value at $215,000. covering the period July 1, 1955 through June 30, 1956.

As previously stated, this action involves the fair rental value for the ensuing two years. At the trial, the testimony as to fair rental value ranged from $205,000. to some $375,000. per annum. Testimony at the trial estimated the fair rental rate at anywhere from 82 cents per square foot to $1.50 per square foot.

The award of the District Court was on the basis of 90 cents per square foot. This results in an amount of $225,000. per annum, or $10,000. more per year than the annual fair value as stipulated by the parties in 1956. An appropriate judgment was entered from which appellant filed a notice of appeal.

The Trial Court's order provided that if the United States did not notify the appellant by January 1, 1958, whether it would continue its tenancy beyond June 30, 1958, the Court would consider the question whether to increase the award because of uncertainty. The United States gave such notice dated December 23, 1957. Shortly thereafter, the appellant's counsel called someone connected with General Services Administration and asked to what period this extension covered. He did not contact the Government's attorney. Not receiving a definite answer from his contact, the appellant's counsel applied to this Court for a remand to the Trial Court for further hearing. Upon appellant's application and without prejudice to the pending appeal, this Court, by order dated March 6, 1958, remanded the record on appeal in this case to the District Court "pending the determination by that Court pursuant to the order and judgment of the District Court, entered

the 22nd day of July 1957." The appellant then filed a motion in the District Court for an order increasing the compensation to be paid to it. Upon consideration of affidavits and a hearing before it, the District Court denied the appellant's motion. Appellant filed notice of appeal from that order and now prosecutes its appeal.

The appellant urges reversal because it claims the Trial Court refused to consider the Government's option and other terms of its taking in establishing the fair market rental value, and thus ignored the holdings of the United States Supreme Court expressed in the cases of *Kimball Laundry Co. v. U. S.*, 338 U. S. 1, 5, and *U. S. v. General Motor Corp.*, 323 U. S. 373. With this contention we do not agree. Quite the contrary.

In establishing the fair market rental value, Judge Knox, amongst other factors, had the value of the Government's option very much in mind. In his opinion, after defining the terms of the taking, he stated: "It thus appears that, if the Government elects to extend its occupancy for a particular year, it is without authority to cancel or terminate the same within such year. On the other hand, unless the Government elects to continue its occupancy for a subsequent year, it is under no obligation to do so."

Then the Trial Court listed the landlord's advantages as follows: (1) If the United States should fail to continue its occupancy, the United States would be obliged to convert the building back into a loft structure; (2) the landlord had no responsibility as to maintenance, care and operation of the interior of the building; (3) the landlord receives rent for lobbies, corridors and toilets; (4) tenants that require 250,000 square feet of space are hard to find; (5) rentals in this area will be at a disadvantage beyond those that now exist; and (6) the right of the landlord to annually negotiate or litigate the annual rental.

Then he provided for the landlord's protection against the option provision through the following previously mentioned provision in his judgment order: "In the event

the petitioner-plaintiff does not notify the defendant-landlord on or before January 1st, 1958, as to whether it will continue its tenancy beyond June 30, 1958, the defendant-landlord may apply for the fixation of a yearly rental in excess of 90 cents per square foot."

Thus, it is very clear that the Trial Judge weighed the disadvantages of the terms of the Government taking—such as the option and its uncertainty as against the advantages in the lease to the landlord. Then, and only then, he reached his decision that 90 cents per square foot.—or $225,000.—is a fair annual rental.

It is further to be noted that, because of the order of the Trial Court, the Government, on or about December 24, 1957, gave notice to the landlord that it would continue its tenancy after June 30, 1958.

In addition, Judge Knox personally inspected the premises, incidentally pointing out that the exterior appearance of the building—the landlord's responsibility—was shabby and unkempt.

As this Court has recently stated, "The ultimate findings of value made by the trial court are not lightly open to reappraisal on appeal." *U. S. v. Jones Beach State Parkway Authority*, 2 Cir., 255 F. 2d 329, 333. After a careful review of the transcript, of the prior history and rentals, of the terms of the taking, including the option, we conclude that the landlord was awarded all that, in all conscience, it was entitled to, under the Constitution.

The defendant-appellant has obtained, after four years of use of its building, investment by the Government in the property of better than $400,000.—at least so says the Government's attorney, and this is not controverted. This is more than the landlord has invested in it. The landlord here seeks an unreasonable increase in rental over that which, one year before, it agreed was fair. The fallacy of the appellant's position is that the Trial Court did not refuse to consider the Government's option and

its other terms. It considered them very carefully as heretofore pointed out. The Trial Court rendered a careful, thoughtful, just and conscientious analysis. What we have said as to this alleged error disposes of the appellant's fourth alleged error—namely, that upon the evidence the award of the Trial Court was insufficient to constitute just compensation.

Nor is there merit to the appellant's contention that there must be a reversal because the Trial Court's judgment was based upon a mistake in fact.

Judge Knox did state that the Columbus Avenue property, then rented by the Government for the Immigration and Naturalization Service, was the most comparable property to that here sought to be taken. He did state that the January, 1953, lease of the Columbus Avenue property to the United States provided for annual rental of 90 cents per square foot of floor space, though it is apparent that it actually provided an annual rental of $1.08 per square foot.

Even so, the Trial Court found that the property in controversy was erected in 1909; the Columbus Avenue property was erected in 1927; that the neighborhood of the Columbus Avenue property shows signs of extensive redevelopment, while that around appellant's property does not. He further found that the exterior of the ground floor of appellant's property showed signs of neglect. Nowhere did the Trial Court say he was awarding the same rental to appellant's building as the Government paid for the Columbus Avenue property.

Just before setting the rental of 90 cents per square foot, the Trial Court stated: "In my judgment, it is better wisdom to place reliance upon indisputable statements and events that, generally speaking, are contemporaneous with the matters for decision, and which are unaffected by the heat, partisanship, and controversy that characterize a lawsuit."

The fixing of the fair market rental was the Trial Court's duty. He had seen these properties, carefully analyzed the entire problem—and reached his decision. We cannot say he was clearly erroneous. *International Bureau* v. *Bethlehem Steel Co.*, 2 Cir., 192 F. 2d 304. We feel his judgment was proper and correct.

Nor is there any merit to the appellant's other claimed error, namely, that the Trial Court relied on incompetent and irrelevant evidence and erroneous standards.

Witness Hines, a Government expert witness, whose testimony the appellant challenges, based his appraisal in part upon rental received by landowners whose premises were occupied by the Government pursuant to condemnation or lease. This was competent, relevant evidence. *U. S.* v. *The Meadow Brook Club*, 2 Cir., — F. 2d —; *U. S.* v. *Delano Park Homes, Inc., et al.*, 2 Cir., 146 F. 2d 473, 475. As to the stipulation of the parties as to the annual rent for the period 1953-1955, this was only one of the many elements inquired of by the Trial Court in his quest to determine just compensation and was not determinative. The evidence of assessed valuations of which appellant complains was put into evidence voluntarily by appellant's counsel during cross-examination of one of its witnesses by the Government's attorney. As has been held, in a trial without a jury, it will be presumed, absent a clear showing to the contrary, that the Trial Court relied only on proper evidence in reaching its conclusion. *Ferguson* v. *Post*, 2 Cir., 243 F. 2d 144, 145. Certainly there is no clear showing that the Trial Court relied in any way on assessed valuations. As to the evidence of cost of acquisition, of which appellant complains, this evidence was admissible in the Trial Court's discretion. *United States* v. *Becktold Co.*, 8 Cir., 129 F. 2d 473, 479.

Judgment affirmed.